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**Title:**

**Paradigms of judicial supervision and co-ordination between  
police and prosecutors: the Italian case in a comparative  
perspective**

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**Title:**

**Paradigms of judicial supervision and co-ordination between  
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**Riccardo Montana\***

**Abstract**

This article intends to describe and analyse the significance and the limits of judicial supervision in Italy. Observations and conclusions will be mainly based on semi-structured interviews with prosecutors, police officers and lawyers conducted in Italy in 2006. It will be argued that prosecutors can effectively supervise cases that they prioritised even though they may leave the police wide discretion in the investigation of routine cases. In so doing, fresh perspectives in the debate around judicial supervision of police investigations will be explored. The question is of intrinsic interest for the analysis of the operation of continental criminal justice systems. Italian criminal procedure is a mixture of adversarial and inquisitorial legal principles and judicial supervision is firmly based on co-ordination between police and prosecutors (who direct the investigation). Moreover, the nature of judicial supervision has also been a subject of debate within the Anglo-American literature which has examined prosecutorial practice in inquisitorial criminal justice systems. Goldstein and Marcus

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in 1977 and the Royal Commission on Criminal Justice in England and Wales (Runciman) in 1993 reached similar conclusions: judicial supervision is, in practice, ineffective. Other authors such as Langbein and Weinreb have suggested a different interpretation and remarked on prosecutors' fundamental contribution, in inquisitorial criminal procedures, to the shaping of the case file. The analysis of prosecutorial practice in Italy can substantially contribute to this debate. And, more generally, it can help to conceptualise the role of prosecutors in contemporary criminal justice systems.

## **1. Introduction**

This paper examines a central feature of Italian criminal procedure – the prosecutor's power to direct criminal investigations. It draws on the author's empirical study conducted in Italy between April and October 2006. Following some guidance from five consultants (2 prosecutors, 1 police officer and 2 lawyers), 49 semi-structured were conducted with prosecutors (27), police officers (11) and lawyers (11). Whilst some interviews were conducted in the centre and the south of Italy, the study focused on practice in the north and were conducted in 10 prosecution offices (lawyers and police officers working in the same area).<sup>1</sup> Italian prosecutors are part of the judiciary and legally supervise and direct the police during investigations, though the police retain significant powers to shape investigation strategies. The central question is:

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<sup>1</sup> The size of the prosecution offices was variable going from very small to very large. Size was determined according to the number of prosecutors working in the office and taking into account the area for which the prosecution office has jurisdiction. From now abbreviations will be used to indicate the interviewees. These are: CP (chief prosecutor), DCP (deputy chief prosecutor), AP (assistant prosecutor), APApI. (assistant prosecutor at the court of appeal), L (lawyer) and Pol.(police).

how effective is judicial supervision in Italy? The study reveals that judicial supervision is effective despite the fact that prosecutorial practices do not fully reflect the legal principles that inform the inquisitorial tradition (or, at least, Italian criminal procedure). Thus, in this context, effectiveness does not necessarily mean fulfilling the specific legal objectives set out in the Italian code of criminal procedure. Judicial supervision is effective to the extent that its mechanisms, in practice, allow prosecutors to regulate and influence the investigation. There are various means to achieve this objective and close supervision of police activities is one. There are, however, other solutions: prosecutors' powers to take crucial decisions during investigations, their capacity to suggest investigation strategies and their interactions with the police can increase prosecutors' chances of exercising control and influence. The topic is relevant because it is central to the analysis of the role of prosecutors in contemporary criminal justice systems. Failure to supervise the investigation effectively (where this power exists) may open the door to extensive and uncontrolled police powers that, accordingly, can undermine both the rights of the defendant and of the victim. Italy is of interest for the analysis of continental inquisitorial systems because of the peculiar and problematic structure of Italian criminal procedure. This is a mixture of inquisitorial and adversarial principles in which prosecutors' functions and institutional role during the investigation are not clearly set out. More generally, this paper tries to describe that, when certain conditions apply, an effective form of co-ordination between prosecutors and police is possible. After the analysis of the relevant academic literature, the legal context and prosecutors' institutional role is examined and the law in action is put under the microscope. The official legal discourse depicts prosecutors as the pivot of the investigation, but what does directing the investigation mean in practice? This question is addressed by analyzing

prosecutors' relations with their 'assigned' police officers and by describing and critically examining their power to direct investigations when a case has been prioritized and when prosecutors believe a case is unimportant. The central argument is that prosecutors can - and in Italy do - effectively supervise serious cases even if routine ones are left to the police.

## **2. Judicial supervision: the story so far**

Judicial supervision is a concept which refers to the practice of prosecuting magistrates (prosecutors or examining judges) in determining how criminal investigations should be conducted and what charges should be filed.<sup>2</sup> In particular, inquisitorial theory<sup>3</sup> recognizes that judicial supervision is aimed at controlling the

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<sup>2</sup> A. S. Goldstein and M. Marcus, "The Myth of Judicial Supervision in Three "Inquisitorial" Systems: France, Italy, and Germany", Vol. 87 *The Yale Law Journal* (1977) pp. 240-283, p. 247. This is a generalization. There are some exceptions. For example, in the Netherlands, the Rechter-Commissaris "does not draw conclusions or make decisions about guilt" and "most investigation is actually done by the police under overall prosecutor supervision". However, The Rechter-Commisaris is still a judicial figure that must be institutionally impartial. See, S. Field, P. Alldridge and N. Jörg, 'Prosecutors, Examining Judges, and Control of Police Investigations', In P. Fennell P, C. Harding, N. Jörg and B. Swart, ed., *Criminal Justice in Europe A Compartaive Study* (New York, 1995) pp. 227-251, pp. 241-242.

<sup>3</sup> Judicial supervision is considered to be one of the distinctive characteristics of inquisitorial criminal procedure systems. Goldstein and Marcus (A. S. Goldstein and M. Marcus, *loc. cit.*, p. 247) say that: "Inquisitorial theory recognises that the key to overall judicial supervision is control of the investigation of crime".

investigation.<sup>4</sup> The controller is a magistrate who, legally, has a quasi-judicial status and should impartially supervise the investigation. Inquisitorial methods of judicial supervision are of obvious interest to those from the inquisitorial tradition. But they have also prompted debate amongst commentators from the adversarial tradition.<sup>5</sup> The dominant Anglo-American academic literature has emphasised both the structural (e. g. lack of resources to scrutinise every investigation in the same way) and cultural<sup>6</sup> reasons behind the ineffectiveness of judicial supervision within continental inquisitorial criminal procedure. Goldstein and Marcus analyzed the practice of judicial supervision in France, Italy and Germany. Their conclusion was quite straightforward: judicial supervision does not exist and is mythical.<sup>7</sup> More recently, Hodgson highlighted that in France police are highly independent during the investigation and that prosecutors are functionally dependent on police. This means

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<sup>4</sup> Ibid. See also J. Hodgson, 'The police, the prosecutor and the *juge d'instruction*. Judicial Supervision in France, Theory and Practice', Vol. 41(2) *British Journal of Criminology* (2001) pp. 342-361, p. 342.

<sup>5</sup> Goldstein and Marcus discuss the problems related to prosecutorial discretion in America, and they argue that: "Responding to these concerns, commentators are turning their attention to the so-called inquisitorial systems of the Western European nations". (A. S. Goldstein and M. Marcus, *loc. cit.*, p. 242). This article was written more than 30 years ago, but looking at different jurisdictions is still a useful exercise to capture the very nature of certain legal and practical problems.

<sup>6</sup> As Lawrence Friedman says, legal culture refers "to ideas, values, expectations and attitudes towards law and legal institutions, which some public or some parts of the public holds". See L. M. Friedman, 'The Concept of Legal Culture: A Reply', in D. Nelken, ed., *Comparing Legal Cultures* (Dartmouth, 1997) pp. 33-41, p. 34. 'Internal' legal culture is the legal culture of "those members of society who perform specialised legal tasks". See L. M. Friedman, *The Legal System: A Social Science Perspective* (New York, 1975) p. 233. This will be the meaning of the expression legal culture for the purposes of this article.

<sup>7</sup> A. S. Goldstein and M. Marcus, *loc. cit.*, This research was also based on interviews with legal actors.

that in order to implement their functions, prosecutors are dependent on the information collected by police that conduct the investigation for which prosecutors are responsible for.<sup>8</sup> This suggests that in France the underlying legal culture is one in which prosecutors accept that the police act independently during the investigation. In France, prosecutors' professional culture is thus founded on a strict separation between police and prosecutorial activities.<sup>9</sup> Others have suggested a different interpretation. Langbein and Weinreb (who focused on France and Germany) argued that prosecutors and examining judges substantially contribute to the shaping of the case file. Similarly Field (et al.)<sup>10</sup> have argued that prosecutors' responsibility for the construction of the file has a different significance within the (Dutch) inquisitorial tradition when compared to the adversarial one.<sup>11</sup> This model of judicial supervision

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<sup>8</sup> J. Hodgson, *French Criminal Justice* (Oxford and Portland, 2005), pp. 169-170. This research was based on interviews, questionnaires and direct observation.

<sup>9</sup> J. Hodgson (2001), *loc. cit.*, p. 350-352. The author explains that one of the interviewees said: "We [prosecutors] inhabit different worlds. They [police] do not know the world of judges and I do not know the world of nightclubs". See also Hodgson (2005), *loc. cit.*

<sup>10</sup> S. Field, P. Alldridge and N. Jörg (1995), *loc. cit.*, p. 237-238. The authors acknowledge that there are not detailed empirical studies dealing with these issues.

<sup>11</sup> On the differences between adversarial and inquisitorial traditions see, for example, A. S. Goldstein, 'Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure', Vol. 26 *Stanford Law Review* (1974) pp. 1009-1027. And J. Jackson, 'The Effect of Human Rights on Criminal Evidentiary Processes: Towards Convergence, Divergence or Realignment?', 68(5) *Modern Law Review* (2005) pp. 737-764, pp. 740-747. See also A. Perrodet, 'The public prosecutor', in M. Delmas-Marty and J. R. Spencer, ed., *European Criminal Procedures* (Cambridge, 2002, reprinted in 2004) pp. 415-459, p. 416. Jackson and Perrodet explain that, today, it is no longer possible to grasp all the complexity of the different European systems by using the dichotomy 'accusatorial' and 'inquisitorial'. Adversarial and inquisitorial are images which reflect a set of ideas and characteristics, but no criminal procedure system is, in practice, fully inquisitorial or adversarial. This study is not trying to compare



does not eliminate police influence. Prosecuting magistrates, for example, only marginally participate in the investigation when the police deal with routine cases.

This debate is now particularly interesting, because English criminal procedure seems to be evolving from a system that has conceived investigation and prosecution as strictly separate functions to a system that allows a partial co-ordination between these two legal actors.<sup>12</sup> In 1985 the Crown Prosecution Service (CPS) was created, mainly, “to interpose some independent decision making between the police decision to charge and the consequent presentation of the prosecution case in court”.<sup>13</sup> But one of the key principles underlying reform, known as the “Phillips” principle, was that investigation and prosecution should remain separate,<sup>14</sup> in order to guarantee prosecutors’ independence.<sup>15</sup> Prosecutors, it was argued, are trained lawyers and police are trained investigators and therefore their functions should not be blurred. The result was what Jackson called an “uneasy compromise”:<sup>16</sup> police retained the power to prosecute and the CPS had to “take over” (and either continue or discontinue) prosecutions established by the police.<sup>17</sup> Within this context the CPS necessarily appeared weak, because police retained the initial decision to charge and

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the practice of prosecution in Italy with these images. These will be useful to discuss relevant literature and to set the legal background that influences the way Italian prosecutors operate.

<sup>12</sup> R. M. White, ‘Investigators and Prosecutors or, Desperately Seeking Scotland: Re-formulation of the ‘Philips Principle’’, Vol. 69 N. 2 *The Modern Law Review* (2006) pp. 143-182, p. 182.

<sup>13</sup> J. Jackson, ‘The Ethical Implications of the Enhanced Role of the Public Prosecutor’, Vol. 9 N. 1 *Legal Ethics* (2006) pp. 35-55, p. 47. See also Royal Commission on Criminal Procedure, Report, Cmnd 8092 (London, HMSO, 1981), chapter 6.

<sup>14</sup> J. Jackson (2006), *loc. cit.*, p. 36. See also, for an analysis of the Philips principle, White, *loc. cit.*

<sup>15</sup> R. M. White, *loc. cit.*, pp. 152-153.

<sup>16</sup> J. Jackson (2006), *loc. cit.*, p. 38.

<sup>17</sup> Prosecutions of Offences Act 1985, s. 3(2).

prosecutors were wholly dependent on the police file and had no legal power to request further information.<sup>18</sup> Further reforms were later discussed. The Royal Commission on Criminal Justice (Runciman) in 1993 looked at judicial supervision in France and Germany to understand how “an inquisitorial pre-trial figure [the prosecutor] [might] fit into the established [adversarial, in England] roles of police, prosecutor, and defence lawyer”.<sup>19</sup> The Commission concluded that, in inquisitorial systems, in the vast majority of the cases, prosecutors’ control is merely formal.<sup>20</sup> So, the CPS would not be effective at investigating or supervising the investigation conducted by the police.<sup>21</sup> It was also considered that a confusion of roles could lead to increased resentment and argument between the police and prosecutors and could affect prosecutors’ objectivity.<sup>22</sup> More recently, the Auld report discussed the difficulties caused by the application of the Phillips principle and, as a consequence, the principles on which a closer liaison between the CPS and the police should be based.<sup>23</sup> The argument was that “the CPS has still to fulfil its proper role”.<sup>24</sup> This is based on different reasons, including lack of co-operation between the police and prosecutors.<sup>25</sup> Now, under the statutory charging scheme,<sup>26</sup> the CPS has the power to

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<sup>18</sup> J. Jackson (2006), *loc. cit.*, p. 38-39.

<sup>19</sup> S. Field, ‘Judicial Supervision and the Pre-Trial Process’, 21 *Journal of Law and Society* (1994) pp. 119-135, p. 121.

<sup>20</sup> Royal Commission on Criminal Justice, Report, (London, HMSO, 1992), p. 13

<sup>21</sup> S. Field (1994), *loc. cit.*, p. 123.

<sup>22</sup> *Ibid.*

<sup>23</sup> Auld LJ, Review of the Criminal Courts of England and Wales: Report. London. TSO. 2001. See also, R. M. White, *loc. cit.*, pp. 174-176.

<sup>24</sup> Auld LJ, *loc. cit.*, ch 10, para 12.

<sup>25</sup> R. M. White, *loc. cit.*, p. 175.

<sup>26</sup> PACE Act 1984 (as amended by the CJA 2003), s. 37B.

charge suspects in all but very minor cases<sup>27</sup> and prosecutors are now based in police stations. This has rectified some of the weaknesses concerning the relationship between the CPS and the police.<sup>28</sup> But the police are still in charge of the investigation and custody officers still have a crucial “gate-keeping” role.<sup>29</sup> It is their responsibility to decide which cases should be considered for prosecution. In this sense, police officers still retain the power to release detainees with no further action (NFA) being taken.<sup>30</sup>

Thus White has argued that the police-prosecutor relationship in England and Wales has developed into one in which it is partially accepted that investigation and prosecution are co-ordinate and not separate functions.<sup>31</sup> The argument of this article is certainly not that English criminal justice has internalized judicial supervision as this concept is understood in inquisitorial systems. The legal theoretical context is different, namely that in England prosecutors do not have any legal power to control the investigation and direct police. So, there is no possible direct comparison with Italy. However, the analysis of the Italian case can contribute to the understanding of the conditions that determine the extent to which judicial supervision is effective when based on direction. Consequently, this should contribute to the more general debate about the conceptualization of prosecutors’ role in contemporary criminal

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<sup>27</sup> S. 28 and Sched 2, amending PACE Act 1984 s 37 (creating the new s 37B). See also A. Sanders and R. Young, *Criminal Justice* (Oxford, 3rd edition, 2007) pp. 332-333.

<sup>28</sup> J. Jackson (2006), *loc. cit.*, p. 39-40.

<sup>29</sup> *Ibid.*

<sup>30</sup> A. Sanders and R. Young, *loc. cit.*, pp. 328-329. The authors underline that this involves a large number of suspects (20-25%) and police officers have no duty to report non-prosecuted cases to the CPS.

<sup>31</sup> R. M. White, *loc. cit.*, p. 182.

justice systems. As Jackson has commented: there is “a lack of clarity as to what the role of the modern prosecutor is.”<sup>32</sup>

### **3. The relationship police-prosecutor in Italy: legal context and prosecutors’ institutional role**

Italian criminal justice has traditionally been inquisitorial. Inquisitorial criminal procedures during the pre-trial phase are based on certain specific requirements. The police must report offences to the investigating magistrate (examining judge or prosecutor) who opens a file. The police are placed at the disposal of investigating magistrates who have the legal power to supervise the investigation, to directly carry out investigative activities and to charge.<sup>33</sup>

Until recently, Italian criminal procedure was not an exception to this model.<sup>34</sup> But in 1989, 35 years after Parliament had started to debate the wholesale reform of criminal procedure, a renewed criminal justice system was designed.<sup>35</sup> This was now meant to be adversarial. The examining judge was abolished. Instead the investigation

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<sup>32</sup> J. Jackson (2006), *loc. cit.*, p. 47.

<sup>33</sup> See, for example, A. S. Goldstein and M. Marcus, *loc. cit.*, p. 247.

<sup>34</sup> See, for example, T. Pizzi and L. Marafioti, ‘The New Italian Code of Criminal Procedure: The Difficulties of Building an Adversarial Trial System on a Civil Law Foundation’ Vol. 17 n. 1 *The Yale Journal of International Law* (1992) pp. 1-40, pp. 3-5.

<sup>35</sup> See d. P. R. n. 447/1988. This means *decreto del Presidente della Repubblica*. It is a piece of delegated legislation issued (formally, the government prepares and is responsible for delegated legislation) by the President of the Republic. In this case the DPR was implementing the *legge delega* n. 81/1987. A *legge delega* is a parent act enabling the government to pass measures which have the force of law. Of course, the aim of this *legge delega* was to reform the code of criminal procedure.

was now to be formally undertaken by the prosecutor who would supervise and direct the police<sup>36</sup> in a system in which the trial was to be seen as an open confrontation between the parties.<sup>37</sup> Within this legal context police functions during the pre-trial phase<sup>38</sup> are: receiving notifications of crime and discovering crimes; managing the consequences of a crime (e. g. restoring public order); conducting investigations (under the prosecutor's direction); securing evidence; performing any act useful to the

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<sup>36</sup> In Italy there is a distinction between the *polizia amministrativa*, which has the function of preventing crime; and the *polizia giudiziaria* (PG) which deals with the investigation together with prosecutors (prosecutors can directly carry out investigative acts (art. 370 para. 1 Italian code of criminal procedure, cpp.). So, the PG are police officers (just like the *polizia amministrativa*) but they primarily deal with crime investigation. They are not a separate police force. This article is only dealing with the PG. However, the impact of the *polizia amministrativa* during the pre-trial phase should not be underestimated: they too (like the PG) come across and collect crime reports.

<sup>37</sup> For a legal analysis of the new Italian code of criminal procedure see, for example, L. Marafioti 'Italian Criminal Procedure: A System Caught Between Two Traditions', in J. Jackson, M. Langer and P. Tillers, ed., *Crime, Procedure and Evidence in Comparative and International Context. Essays in Honour of Professor Mirjan Damaška* (Oxford and Portland, 2008) pp. 81-99. J. J. Miller, 'Plea bargain and its analogues under the new Italian criminal procedure code and in the United States: towards a new understanding of comparative criminal procedure' 22 *N. Y. U. Journal of International Law and Politics* (1989-1990) pp. 215-251. T. Pizzi and L. Marafioti, *loc. cit.* L. J. Fassler, 'The Italian Penal Procedure Code: An Adversarial System of Criminal Procedure in Continental Europe' 29 *Columbia Journal of Transnational Law* (1991) pp. 245-278. L. F. Del Duca, 'An Historic Convergence of Civil and Common Law Systems-Italy's New "Adversarial" Criminal Procedure System' Vol. 10:1 *Dickinson Journal of International Law* (1991) pp. 73-92. S. P. Freccero, 'An Introduction to the New Italian Criminal Procedure' Vol. 21 n. 3 *American Journal of Criminal Law* (1994) pp. 345-383. And E. Amodio and E. Selvaggi, 'An Accusatorial System in a Civil Law Country: the 1988 Italian Code of Criminal Procedure' Vol. 62 *Temple Law Review* (1989) pp. 1211-1224.

<sup>38</sup> In certain circumstances these functions can also be carried out on their own initiative (see art. 55 and 348 cpp).

prosecution; and limiting the consequences of a crime.<sup>39</sup> They also retain powers that can be activated by prosecutors or, to a certain extent, exercised autonomously. First, police officers may carry out investigative acts on their own initiative from the moment they receive notification of a crime to the moment the prosecutor begins to direct the investigation. Secondly, they can perform investigative acts under prosecutors' delegated authority (the so called *delega*<sup>40</sup>). Thirdly, police have the duty to communicate 'without delay' (sometimes immediately) the crime reports they discover to prosecutors. Finally, the police retain their powers in relation to the investigation even though prosecutors are supervising the case.

In Italy the police-prosecutor relationship is also built around the principle, stated in the Italian code of criminal procedure (art. 56 and 327 code of criminal procedure (cpp), that police are functionally but not organizationally dependent upon prosecutors.<sup>41</sup> This conceptual distinction between *dipendenza funzionale* (functional dependence) and *dipendenza organizzativa* (organizational dependence) is complex and needs clarification. Functional dependence means that superiors have the right to determine what subordinates do. Organizational dependence means that superiors have the right to manage the organization (e. g. career, promotions, transfers, allocation of resources) of their subordinates. The police officers (*polizia giudiziaria*, PG) that carry out investigative activities are functionally dependent on prosecutors

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<sup>39</sup> See, for example, G. P. Voena, 'Soggetti', in G. Conso and V. Grevi, ed., *Compendio di Procedura Penale* (Padova, 2nd edn, 2003) pp. 57-111, pp. 80-84. See also (in general for the role and the functions of PG) A. Scaglione, *L'attività ad iniziativa della polizia giudiziaria* (Torino, 2001).

<sup>40</sup> The *delega* is very similar to the French *commission rogatoire*. When prosecutors issue a *delega* it means that they delegated to police the authority to perform investigative acts. A *delega* is, of course, not necessary when police officers retain autonomous powers to investigate.

but organizationally dependent on their hierarchical superiors within the police. But the degree of functional and organizational dependence may vary depending on the type of police officer.<sup>42</sup> Here it is important to distinguish between the terms *sezioni* (sections) and *servizi* (services). The *sezioni* of the PG are immediately and directly dependent on prosecutors.<sup>43</sup> This means that prosecutors can use these police officers to carry out investigative acts without the prior intervention of hierarchical superiors within the police.<sup>44</sup> These officers are exclusively dedicated to crime investigation. But, unlike the *sezioni*, the PG units known as *servizi* (services) perform other functions in addition to crime investigation<sup>45</sup> and are directly managed and controlled by higher-ranking police officers who legally take the decision as to which and how many police officers will be assigned to the investigation.<sup>46</sup> This clearly reduces prosecutors' powers to control and direct the investigation and makes the units of the *servizi* less functional dependent upon prosecutors.

In theory, Italian criminal procedure still firmly puts the investigation under the direction of prosecutors. But, as always, if one wants to understand Italy, it is necessary to look beyond the formal legal rules. Giostra has argued that the legal

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<sup>41</sup> See art. 56 and 327 cpp.

<sup>42</sup> For a general discussion about functional and organizational dependence of PG's officers see, for example, G. P. Voena, *loc. cit.*, pp. 84-90.

<sup>43</sup> Ibid. pp. 86-87.

<sup>44</sup> Ibid. pp. 87 and 89.

<sup>45</sup> They also work as *polizia amministrativa*, see above n 36.

<sup>46</sup> AP(N48) said: "If I need police forces for an investigation which is not perceived as a priority by police hierarchical superiors, it can be a problem. They will never tell you that they will not support you, but if you do not get the best men [...] Yes, it has happened, even for serious cases, but the point is: who considers these cases to be serious?"

framework de facto allows two distinct investigations, one before the case is referred to the prosecutor, the other afterwards. Art 347, para 1, cpp states that the PG must refer crime reports to prosecutors “without delay” and no longer specifies, as it used to in the original version of the 1989 reform, within 48 hours.<sup>47</sup> The expression “without delay” (which certainly can extend to 48 hours) appears very broad. This potentially leaves the police with the power to take decisions at the beginning of the investigation (before reporting to the *pubblico ministero*).<sup>48</sup> Giostra claims that police now have the right to determine the initial strategy and direction of the investigation.<sup>49</sup> In other words, the legal rules seem to have created a substantial distinction during the pre-trial phase: police perform the investigative acts; prosecutors deal with the result.<sup>50</sup> Prosecutors’ pivotal role during the investigation may also be undermined by

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<sup>47</sup> G. Giostra, ‘Pubblico ministero e polizia giudiziaria nel processo di parti’, in Centro Nazionale di Prevenzione e Difesa Sociale. Convegni di studio <<Enrico De Nicola>>: Problemi attuali di diritto e procedura penale (conference papers) *Il pubblico ministero oggi* (Milano, 1994) pp. 179-190, p. 180. See also, for example, F. Cordero, *Procedura penale* (Milano, 2000) p. 808. In 1992 the government issued a *decreto legge* (D.L.) to amend the 1989 reform. A D.L. is a piece of delegated legislation that the government can issue (without any parent act) when it is necessary to do so. However, the parliament must convert the *decreto* into an Act (art. 77 cost.). This was the D.L. n. 306/1992 which was subsequently converted (with amendments) into the Act n. 356/1992. This amended art. 347 cpp. Now PG must refer the crime report to prosecutors “without delay” and not within 48 hours.

<sup>48</sup> G. Giostra, *loc. cit.*, p.180.

<sup>49</sup> Ibid. See also Nannucci who claims that, there is not now one figure (the prosecutor) who is leading the investigation and one figure (police) who has important but subordinate powers (subordinate to prosecutors’ directives). Both these figures are legally entitled autonomously to conduct investigative acts. U. Nannucci ‘Pubblico ministero e polizia giudiziaria nel processo di parti’, in Centro Nazionale di Prevenzione e Difesa Sociale, *loc. cit.*, pp. 180-194, p. 176.

<sup>50</sup> G. Giostra, *loc. cit.*, p.181.



the distinction between sections (*sezioni*) and services (*servizi*). As Voena has noted, prosecutors can directly use the sections, there is no ‘filter’ from police officers’ hierarchical superiors.<sup>51</sup> But when the units known as *servizi* are involved, prosecutors have to ask if services are available (or better, if the officers they want are available) for the investigation. This is not a mere legalistic distinction. In practice, if the investigation is or becomes complicated (e. g. involves many accused persons, certain difficult investigative acts have to be carried out) prosecutors will have to contact the services. The reasons are both quantitative and qualitative. There are many more police officers in the services than the sections. And the services also include some specialised units such as those dealing with organised crime.<sup>52</sup>

The complexity of prosecutors’ role during the pre-trial phase is also reflected by the general normative principles that form the Italian criminal justice system. As noted at the outset, Italian criminal procedure is a mixture of adversarial and inquisitorial principles. This is visible in the whole structure of the 1989 reform.<sup>53</sup> Prosecutors are considered to be a party to criminal proceedings from the beginning of the investigation.<sup>54</sup> Supporting the prosecution does not, however, fully describe their functions and professional values. They are also responsible for the correct

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<sup>51</sup> G. P. Voena, *loc. cit.*, p. 87.

<sup>52</sup> Ibid. pp. 85-86. Finally, there are the other police officers who carry out functions of *polizia giudiziaria*. In relation to these police officers prosecutors’ functional and organizational superiority is extremely limited. See G. P. Voena, *loc. cit.*, p. 87. For *sezioni*, *servizi* and other PG officers see art. 56-59 cpp.

<sup>53</sup> See, for example, L. Mararfioti, *loc. cit.*

<sup>54</sup> See, for example, U. Nannucci, *loc. cit.*, p. 176. F. Della Casa ‘Soggetti’, in Conso and Grevi, ed., *loc. cit.*, pp. 1-57 and 112-161, pp. 57-58.

application of the law.<sup>55</sup> This underpins the ideology of public prosecutors, which is rooted in legal values and a professional culture that designates prosecutors, in accordance with the inquisitorial tradition,<sup>56</sup> as neutral quasi-judicial figures.<sup>57</sup> This is the traditional interpretation of prosecutorial functions that developed under the pre-1989 code.<sup>58</sup> The legal structure effectively substantiates this interpretation. In the current system, judges and prosecutors belong to the same professional category. They are both part of the judiciary. They share the same career path and can switch functions. Finally, prosecutors, like judges, are fully independent of any other constitutional power (e.g. the executive).<sup>59</sup> This institutional context is, to a certain extent, protected by the legality principle (art. 112 Italian constitution, *cost.*) which

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<sup>55</sup> Ibid. p. 58.

<sup>56</sup> J. Jackson, 'The effect of legal culture and proof in decisions to prosecute' Vol. 3 *Law, Probability and Risk* (2004) pp. 109-131, pp. 112-114. The author says that "prosecutors within the inquisitorial tradition have been more easily able to assume judicial status because they were born out of the separation of powers relating to prosecution and investigation which were all originally exercised by the judge alone", p. 113. See also D. Salas 'The Role of the judge', in M. Delmas-Marty and J. Spencer, ed., *loc. cit.*, pp. 488-541, pp. 488 and 497.

<sup>57</sup> See, for example, N. Zanon and F. Biondi, *Il sistema costituzionale della magistratura* (Bologna, 2006) p. 126. The authors acknowledge that this is the traditional interpretation, but they criticise it.

<sup>58</sup> See, for example, G. Vassalli, *La potestà punitiva* (Torino, 1942) p. 180. See also Zanon and Biondi, *loc. cit.*, p. 132. This interpretation was confirmed by the Italian constitutional Court. See Corte cost. sent. n. 190/1970; n. 123/1971; n. 63/1972; n. 88/1991 and n. 96/1975.

<sup>59</sup> On the importance of cultural proximity between judges and prosecutors see, for example, M. Maddalena 'Il ruolo del pubblico ministero nel processo penale', in Centro Nazionale di Prevenzione e Difesa Sociale, *loc. cit.*, pp. 48-53. The legality principle is considered to be the projection of the principle of equality within the Italian criminal justice system. This also enhances and protects prosecutors' independent and neutral status and it seems to support the traditional interpretation of prosecutorial functions. See, for example, N. Zanon and F. Biondi, *loc. cit.*, p. 135.

states that *pubblici ministeri* are bound to prosecute all crimes. The Italian constitutional fathers thought that “independence and mandatory prosecution [were] two faces of the same coin”.<sup>60</sup> These concepts are meant to be the projection into the criminal justice system of the principle of equality before the law, which is also stated in the constitution (art. 3).<sup>61</sup>

The continued accuracy of this interpretation of the prosecutorial role has been widely criticised. For example, Grande argues that, since the 1989 adversarial reform, prosecutors have become “straight accusers”.<sup>62</sup> The author refers to Cordero who says: “if the prosecutor disregards [evidence favourable to the suspect], looking just in one direction, he/she risks a failure at trial or even before at the preliminary hearing; that the prosecutor must also consider the suspect’s side is a matter of elementary caution”.<sup>63</sup> This interpretation reduces the emphasis on prosecutors’ judicial distance and emphasizes the adversarial nature of Italian criminal procedure. Prosecutors’ goal is to construct a case which will stand scrutiny at trial<sup>64</sup> and not to search for the legal and factual truth.

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<sup>60</sup> G. Di Federico, ‘Prosecutorial independence and the democratic requirement of accountability in Italy’ 33 n. 3 *British Journal of Criminology* (1998) pp. 371- 387, p. 375. See also G. P. Voena, *loc. cit.*, p. 59.

<sup>61</sup> N. Zanon and F. Biondi, *loc. cit.*, p. 135.

<sup>62</sup> E. Grande, ‘Italian Criminal Justice: Borrowing and Resistance’ 48 *American Journal of Comparative Law* (2000) pp. 227-260, p. 235.

<sup>63</sup> F. Cordero, *loc. cit.*, p. 742.

<sup>64</sup> A. Sanders and R. Young, *loc. cit.*, pp. 13-14. The authors say that adversarial systems put their emphasis “on the parties proving their case”.

It is difficult to argue that judicial supervision is not a distinctive feature of Italian criminal procedure. There is also some evidence, like prosecutors' quasi-judicial status, which continues to support the argument that Italian judicial supervision reflects inquisitorial theory. However, there are also ambiguities that suggest prosecutors are not firmly in the position to control the investigation. There is, therefore, the need to look at the practice to understand the nature and the meaning of directing the investigation.

#### **4. The law in action**

The analysis of judicial supervision in terms of relevant legal norms is certainly complicated. But its practical adaptations are even more difficult to grasp. What does it mean in practice to say that prosecutors direct the investigation? Do prosecutors supervise all the cases in the same way? What are, in practice, the police's powers?

These questions have been partially analyzed in the academic literature. As noted, Goldstein and Marcus conclude that judicial supervision does not exist and is mythical. The Italian academic literature is more extensive, but is still not founded on major empirical studies. Research has concentrated on two issues: prosecutors' professional culture during the pre-trial phase and the methods *pubblici ministeri* use to direct the investigation. Di Federico, like Goldstein and Marcus, has tried to demonstrate that the legal rules that designate prosecutors as impartial judicial figures are not properly implemented. The author claims that during the pre-trial phase, prosecutors "acquire the typical characteristics that police officers have".<sup>65</sup> Two

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<sup>65</sup> G. Di Federico and M. Sapignoli *Processo penale e diritti della difesa* (Roma, 2002).

observations can be made. First, Di Federico's and Sapignoli's empirical study (from which these conclusions were derived) was based on interviews exclusively conducted with lawyers. Secondly, their study did not directly concern the police-prosecutor relationship, but rather the way accused persons' rights were respected by *pubblici ministeri*.

The second issue, the methods used by prosecutors to supervise investigations, is particularly important for the purposes of this article. There are suggestions that prosecutors' supervision of the investigation may vary depending on the case. Volume crimes (e.g. street crime) are mainly investigated and dealt with by the police and the prosecutors' function becomes that of police legal advisor.<sup>66</sup> That is a sort of 'routinised bureaucratic' review of the results of the investigation.<sup>67</sup> On the other hand, for serious cases prioritised by prosecutors, they become the directors of the investigation. They coordinate the police and effectively take investigative initiatives.<sup>68</sup> This closer form of judicial supervision does not imply that prosecutors directly carry out investigative acts. Police officers are forced to delegate the investigation to police officers under *delega*,<sup>69</sup> because the volume of crimes is too great. However, this practice is encouraged by the fact that prosecutors trust police professionalism.<sup>70</sup>

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<sup>66</sup> M. Vogliotti, 'Les relations police-parquet en Italie: un équilibre menacé' n. 58 *Droit et Société* (2004), pp. 453-504, pp. 495 and 499-500.

<sup>67</sup> C. Sarzotti, *Cultura giuridica e culture della pena* (Torino, 2006) pp. 142-155.

<sup>68</sup> M. Vogliotti, *loc. cit.*, p. 500-501.

<sup>69</sup> *Ibid.* p. 481.

<sup>70</sup> *Ibid.* p. 481-482 and p. 502.

Thus Vogliotti and Sarzotti's views emphasise that there seem to be two methods of directing the investigation depending on the seriousness of the case. However, neither Sarzotti nor Vogliotti give a detailed explanation of how the two different styles of supervision work in practice. In the following sections, empirical data based on interviews conducted with prosecutors, police officers and lawyers will be used to provide the detailed description of practice on the ground. Three different issues will be addressed: the meaning of "directing the investigation"; the way prosecutors supervise the investigation of cases that they do and do not prioritise; and the way the police can influence their choices.

## **5. Directing the investigation: the distinctive role of assigned police officers**

To understand the police-prosecutor relationship in Italy during the investigation it is necessary to explain the peculiar position of "assigned" police officers.<sup>71</sup> These are officers from the *sezioni* (sections) of the PG (investigative police) who, as we have seen, are functionally and, to a certain extent, organizationally dependent on prosecutors.

If the prosecution office is of medium size or larger, each prosecutor has a certain number of police officers "assigned" to him/her.<sup>72</sup> This means that they work exclusively for that specific prosecutor. The professional closeness between these legal actors is so strong that *pubblici ministeri* normally call these police officers "my

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<sup>71</sup> The term assigned police officers is a literal translation of the wording used by prosecutors.

<sup>72</sup> In the sites visited the number varied from 2 to 4.

police officers” or “my collaborators”. This connection is further strengthened by the fact that sometimes they work in the same building. Obviously these police officers can not deal with every case. Sometimes specific preparation/knowledge is required or, simply, an increased number of investigators is necessary. In these situations prosecutors will involve other police officers who do not exclusively work for them. Prosecutors call them the “external” police and they are part of the *sezioni*.<sup>73</sup>

Perhaps the most interesting feature of the relationship between “assigned” police officers and prosecutors is the latter’s power to organize, train and manage their police officers:

I have a very efficient *ufficio*.<sup>74</sup> In fact, my collaborators are very well prepared, and I have spent some time training them, so that now they perform efficiently. [...] The point here is that I tried to apply that project, which has never really been applied, concerning the *ufficio del pubblico ministero*. This means that the prosecutor is the director of his *ufficio* and he/she [only] carries out the activities which can not be delegated; these are: the hearings and the preparation of the hearings. The vast majority of the other activities are performed by my collaborators; I only read, double check, correct and sign.<sup>75</sup>

The idea of “*ufficio del pubblico ministero*” seems to be that of setting up a team that can cope with legal, administrative and investigative tasks. Prosecutors become the managers of the teams (and the coaches as well because they have to train their personnel). This means that their police officers (and administrative staff) are

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<sup>73</sup> See, for example, CP(S4).

<sup>74</sup> This literally means office, but the appropriate translation, in this context, would be team (see the concept of *ufficio del pubblico ministero*).

<sup>75</sup> AP(N31). Similar opinions (particularly on the importance of the personnel working with prosecutors) were expressed by AP(N30).

taught how to prepare a file, to conduct the investigation and to report to prosecutors. In other words: they are taught how to prepare, in a reasonable amount of time, a file that will stand scrutiny at trial. This power is not only left to the initiative of the single prosecutor. In one of the sites visited, the chief prosecutor issued a circular in which he explicitly suggested that prosecutors set up and organise their office/team in order to find the best practices to deal with volume crimes.<sup>76</sup>

The *ufficio del pubblico ministero* appears therefore to be a versatile system for organizing prosecutorial activities. The objective should be one of efficiency and prosecutors are in charge of defining the practical rules to achieve it. This certainly emphasises prosecutors' exercise of discretionary powers, but the potential influence of these police officers should not be underestimated. Prosecutors are still partially dependent upon "assigned" police officers who carry out various important activities. Within this context policing means: to be directly involved in investigations; to prepare the files (including writing the charges);<sup>77</sup> and to chase files that have been assigned to the "external" police. This last function is crucially important. In practice, police officers can become the prosecutor's 'eyes' checking that the investigation is carried out properly and on time.<sup>78</sup> "Assigned" police officers are thus multifunctional professional figures who extend the supervisory 'reach' of the prosecutor.

In the end, the activities that 'assigned' police officers carry out seem to be prompted, directed and managed by prosecutors. Yet prosecutors themselves remain dependent upon and influenced by "assigned" police officers who shape investigations in important ways. So, there is a strong functional interdependence

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<sup>76</sup> CP(N43).

<sup>77</sup> L(N20) .

<sup>78</sup> AP(N1), AP(N2) and AP(N3).



between *pubblici ministeri* and “their” police officers. This analysis also demonstrates that supervision appears to be an office bound job, with little direct involvement in the investigation. However, this does not necessarily mean that prosecutors are mere passive figures. On the contrary, in Italy, prosecutors actively decide on the functions that “assigned” police officers must carry out. Finally, the interdependence and strong co-ordination between prosecutors and “assigned” police officers did not seem to have created a problematic professional relationship. Instead, their relationship is based on co-operation and trust. And, although the police and prosecutors’ functions may overlap, their role is not confused. Prosecutors are the directors; the police are the executors.

## **6. Directing the investigation: prompting and reviewing**

As above, the legal concept of judicial supervision is expressed through the interrelationship between the prosecutors’ power to direct the investigation and police power to carry out investigative acts autonomously. In the next two sections the meaning, in practice, of the concept of directing the investigation will be described. Firstly, it will be explained how prosecutors supervise the investigation when they have prioritised a case and, secondly, their approach when they believe the case is not important.<sup>79</sup> The police-prosecutor relationship when investigations are carried out

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<sup>79</sup> The analysis of the criteria for the definition of priorities goes far beyond the purposes of this study. Suffice to say here that in Italy prosecutors appear to be in charge of these choices and they decide according to local (e.g. local crime problems) and institutional (e.g. the more severe the punishment stated by the law, the more serious the crime) criteria. This decision making process is also influenced by stigmatisation, common sense and images of crime of the media, the central state and the public. But prosecutors seem to be able to partially resist these external influences (see R. Montana, ‘Prosecutors

(by police) under *delega* and the practical consequences of prosecutors' decision to directly carry out investigation activities will also be discussed.

But, first a preliminary point needs to be clarified. As explained in the previous section, the distinction between 'assigned' and 'external' police matters for two reasons. First, it illustrates the importance (just in the context of the investigation) of police activities during the pre-trial phase and secondly, how extensive prosecutors' powers to manage police officers may be (in certain circumstances). But this distinction is less important when the different styles of supervision are discussed. Prosecutors are more involved in the investigation if they believe that the case is important and must be prioritised regardless of the type of police officer. So, in the next sections, the word police will be used without distinguishing between 'assigned' and 'external' police.

When prosecutors have prioritised a case the police-prosecutor relationship appears to be based on constant communications between these two legal actors. Prosecutors and the police discuss the investigation on a regular basis. In practice, police officers keep going backwards and forwards, performing a particular investigative act and then reporting back to the prosecutor.<sup>80</sup> This "backwards and forward" system is not one where police carry out all the investigative acts and only then refer back to the prosecutor. On the contrary, the police report to prosecutors regularly, and, sometimes, after every single act conducted.

At first glance prosecutorial activities at this stage appear passive and reactive, but this description is not complete. Reviewing often (or always) leads to more

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and the definition of the crime problem in Italy: balancing the impact of moral panics' *Criminal Law Forum* (accepted, forthcoming 2009).

<sup>80</sup> L(N20). See also, for example, L(N21).

activity. In other words, the review of police investigation is instrumental to the issuing of detailed guidelines about future investigative strategies. This, in practice, means that prosecutors carefully list the investigations police must carry out. Within this very practical context prosecutors can be rightly regarded as “authenticating” authorities,<sup>81</sup> if this means that they review police activities. But, at least when the case has been prioritized, prosecutors seem to be both proactive and reactive in their treatment of police reports. One of the lawyers I interviewed said: “Prosecutors intervene later. They act after every investigative act that the police have performed and that prosecutors *have told them to carry out* [emphasis added]”.<sup>82</sup> And one prosecutor very clearly said: “For the cases where the investigation is complicated we normally give instructions and then, every time we receive the results, we issue new instructions”.<sup>83</sup> This seems to confirm that “reaction” is just one of the elements that build up this style of supervision.

Thus when prosecutors prioritized a case “directing the investigation” means that they will carry out two main functions: prompting and reviewing. Prosecutors issue instructions and the police implement them. Prosecutors will subsequently review the results and, if necessary, will issue new instructions. This is the meaning of the “back (reviewing) and forward (prompting)” system that was described above. And this shows that judicial supervision is not only a matter of performing a bureaucratic review of police’s activities. It also involves *pubblici ministeri* prompting

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<sup>81</sup> E. Mathias, ‘The balance of power between the police and the public prosecutor’, in M. Delmas-Marty and J. R. Spencer, ed., *loc. cit.*, pp. 459-488, p. 483.

<sup>82</sup> L(N20).

<sup>83</sup> APApl.(N50). See also, for example, Pol.(N19) who confirmed this analysis of prosecutors’ functions when they direct the investigation.

with inputs which shape the way police carry out the investigation. So, directing is, to a certain extent, similar to planning. Prosecutors have a plan about the investigation and they ask the police to execute it. Obviously, the plan is influenced by the information provided by the police.

Prosecutors' instructions to carry out the investigation are transmitted via the *delega*, which is a written document:

The more the *delega* is detailed the more the investigation will be shaped by the prosecutor [...] If the *delega* is not detailed the police's powers, which are already quite strong, will increase. I think that the *deleghe* [plural of *delega*] should be very detailed, even when the case is not so important; however I always leave a certain amount of freedom to police<sup>84</sup> [...] If the prosecutor really wants to play his part he has to act like this. However, if the case is less important the *delega* will be less detailed, but still it has to be precise.<sup>85</sup>

It is interesting to note that one prosecutor said that prior to the 1989 reform issuing a detailed *delega* was viewed as an unusual interference. Police officers perceived this as a lack of trust in their capacity to perform a good investigation. On the contrary, he said, now police are expecting a detailed *delega*. This is considered (by prosecutors and the police) the right way to proceed.<sup>86</sup> However, in the next section it will be noted that, for the cases which have not been prioritised, *deleghe* are not always detailed and, sometimes, leave a great amount of initiative to the police.

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<sup>84</sup> On this point AP(N11) explained that the *delega* must be very specific in defining the activities that police must carry out. So, in general, this document is a sort of bullet points list. Outside the list, it is the realm of police's initiative.

<sup>85</sup> AP(N33). Similar opinions were expressed by AP(N11) and AP(C46).

<sup>86</sup> AP(N11). The same opinion was expressed by Pol.(N14).

Finally, note that the *delega* is not the only means prosecutors have to communicate with the police. *Pubblici ministeri* can also direct the police by phone and by setting up regular meetings.<sup>87</sup> This does not mean that, in these cases, the *delega* will not be issued but that prosecutors will use the systems which are more suitable to guarantee that they will be always kept informed and that the police will execute the prosecutors' directives.

The large number of crime reports received by prosecution offices prevents prosecutors from directly carrying out investigation activities in the vast majority of the cases.<sup>88</sup> This is why a detailed *delega* is so important. There are however situations when prosecutors are more active. They carry out investigation activities when they believe this is necessary or the case is very important. However, this is not a separate style of supervision. Prosecutors only carry out some investigative acts when they also prompting through guidelines and reviewing information. So, carrying out investigation activities is a sort of 'extra' function added to the prompting and

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<sup>87</sup> See, for example, AP(C46), AP(Apl.(N50) and AP(N32).

<sup>88</sup> Prosecutors have been asked about the number of files they have to deal with in one year. The figures are different, between 300 and a few thousands files a year. Some prosecutors have less than 300 cases, but these are exceptions (CP(N43) and AP(N48). One prosecutor (APN(48) explained that he has less cases, but that most of them are very complicated, so they are very time consuming. The vast majority of the prosecutors said that they have more than 1000 files to deal with every year. In particular, 18 prosecutors out of 27 said so. 2 did not know (but one said that they are a lot). One did not clearly answer. One was not asked (due to lack of time). 5 said that they have less than 1000 files to deal with every year. Prosecutors wanted to remark that the large number of files is one of the reasons why they can not treat all the files in the same way. Only one chief prosecutor (CP(N43) claimed that his prosecution office is very well organised and they can deal with all the cases in the proper way. Finally,

reviewing system, but it does not significantly change the nature of this style of judicial supervision.

Prosecutors can directly interview certain witnesses and/or accused person(s). So, for example, they interview the *collaboratori di giustizia*<sup>89</sup> particularly for organised crime and terrorism cases. The same seems to happen when minors are implicated and have been sexually or otherwise abused. These are clearly situations which require a lot of sensitivity and prosecutors know from the beginning that they want to carry out these interviews. However, prosecutors do not just decide *a priori* to perform investigative acts in particular types of cases (e. g. murder, organised crime etc.). They may also choose to “step in” because they are perplexed by the evidence obtained by the police, simply want to reanalyze it or want to oversee the implementation of a particular investigative act (i. e. to ask specific questions). The decision to “step in” is normally influenced by the way the investigation is evolving. But police reports are still vital information for prosecutors and can significantly influence this choice:

It was my first case of homicide. It was during the night, the police called and said there was a dead man on the side of a road and that they thought it was an accident. I told them to check for evidence and to do, themselves, the routine activities (e. g. prevent people contaminating the area, search around etc.). Then they called me back to tell me that, close to the body, they had found a car. Again, I said to continue with the searching activities. Later they called me
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it should be remarked that in Italy the legality principle applies. So, in theory, all the crimes should be prosecuted.

<sup>89</sup> These are also called *pentiti*. They are (ex) criminals who decide to testify (and get benefits for this) against criminal organizations and/or single persons. These are normally involved in organised crime and/or terrorism cases. In practice, most of the important actions taken against mafia and the red brigades started from information provided by *pentiti*.

again to tell me that they found that the dead person had a hole behind the head (similar to a bullet hole). So, I said to close off the whole area and to wait for me. Then they sent me a car and I was there in 15 min.<sup>90</sup>

In the end, the element which seems most to characterise the prompting and reviewing form of supervision is the fact that police and prosecutors constantly interact and communicate. Interaction does not necessarily imply confusion of roles, but it carries a substantial amount of interdependence. Even when detailed *deleghe* have been issued, investigative acts will be mainly carried out by police officers. So, it appears misleading to look at the “prompting and reviewing” system as a method by which prosecutors eliminate police influence; but it would be probably correct to see it as the best tool that *pubblici ministeri* have to mediate police influences during the investigation. It is difficult to define precisely how influential Italian prosecutors can be at this stage of the proceedings. They certainly rely very much on the information collected by police officers and, as a consequence, the powers to direct the investigation may be, in practice, limited. So, similarly to Hodgson’s conclusions about the French system, the information provided by police restricts prosecutors’ powers. However, when the case has been prioritised prosecutors’ powers to direct the investigation potentially balance police powers to carry out investigative acts. In this way, judicial supervision becomes effective.

These considerations seem to suggest some differences in relation to studies of judicial supervision in other continental jurisdictions. Goldstein and Marcus say that “prosecutors and examining judges do little more than confirm what police have

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<sup>90</sup> AP(N11).

done”;<sup>91</sup> and define prosecutors’ role during the pre-trial phase as passive and reactive.<sup>92</sup> Hodgson suggests that, in France, judicial supervision in practice does not empower prosecutors to challenge or go beyond “the case parameters set by police”.<sup>93</sup> More generally, Mathias does not see, in practice, a significant difference between the police-prosecutor relationship in continental Europe when compared to England. Italy (like, for example, Germany and France) is used as an example to describe the converging practices between adversarial and inquisitorial systems. These practices emphasize prosecutors’ ineffectiveness and the practical domination of police during the pre-trial phase.<sup>94</sup> These differences may certainly be linked to the fact that different jurisdictions operate in different ways, but there may be other explanations. Goldstein and Marcus tried to define general characteristics across the Italian, French and German criminal justice systems. Hodgson concentrated on one style of supervision in France. Here different methods of supervision have been identified. These may suggest the dangers of over-generalization. Obviously, the central argument is not that judicial supervision is conducted in the same way everywhere. But the differences between the findings of this article and of studies previously cited may also be in the subtlety of analytical distinctions as much as jurisdictional differences. Thus, the argument presented here is that when police and prosecutorial activities are co-ordinated, prosecutors may, under certain conditions, have sufficient resources to limit the impact of police interests and values.

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<sup>91</sup> A. S. Goldstein and M. Marcus, *loc. cit.*, pp. 248-249.

<sup>92</sup> *Ibid.* p. 282. The authors say that: “judges and prosecutors in these Continental systems are in fact more passive and reactive than in the United States”.

<sup>93</sup> J. Hodgson (2005), *loc. cit.*, pp. 169-170.



## 7. Directing the investigation: bureaucratic review

Bureaucratic review is a different form of supervision to the “prompting and reviewing” system. It concerns volume crimes that prosecutors, in general, do not prioritise. Sometimes, *deleghe* are not issued. In these situations police will have substantial powers to perform the investigative acts they want to carry out provided they follow legal rules. This form of supervision is mainly carried out “on paper”.<sup>95</sup> And the moments of interaction with police are rare. These only take place at two points: at the beginning of the investigation (if the *delega* has been issued) and at the end when *pubblici ministeri* review the results.

In theory prosecutors should participate more when certain investigative acts have to be performed. These are, for example, seizures, searches and/or telephone tapping, which must be authorised by prosecutors. The clearest example is surely arrest. The police are in charge of the decision to arrest (sometimes it is compulsory) but prosecutors must intervene immediately. The code of criminal procedure states that police must immediately report to prosecutors that an arrest has been carried out (art. 386 para. 1 cpp) and they must, as soon as possible (and no later than 24 hours), put the arrested person(s) in contact with the prosecutor (art. 386 para. 3 cpp, this literally says: “at prosecutor’s disposal”). Then, only the prosecutor can interview the person(s) under arrest (art. 388 para. 3 cpp). At this stage the prosecutor, de facto, must review the arrest procedure because the law requires that he/she decides either

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<sup>94</sup> E. Mathias, *loc. cit.*, pp. 471-483.

<sup>95</sup> In this context “on paper” means that prosecutors send and receive written documents, for example via fax (see AP(N32). So, there are not telephone calls or regular meetings between the police and prosecutors.

that the arrested person(s) must be immediately set free (art. 389 cpp) or that the arrest was lawful and must be validated by a judge (art. 390 cpp.), in this case there will be an hearing, called “validating hearing” (art. 391 cpp). This is the impression given by the legal norms but the practice may be considerably different. *Pubblici ministeri* are legally activated and should oversee the implementation of certain investigative acts but this only happens if the case is a priority. For example, street crime often involves arrested persons, but it is not perceived as a serious crime by Italian prosecutors. So, in practice, these investigations are bureaucratically supervised even when they require a prompt intervention by the prosecutor.

One of the best examples of the prosecutors’ bureaucratic review form of supervision is the SDAS<sup>96</sup> group in Milan. This is a group which deals with cases which have not been prioritised. These can be defamations, small frauds, car accidents etc. There are 6 prosecutors and one deputy chief prosecutor who, amongst other functions, manage the SDAS. They claim to treat approximately 80% of the cases which arrive at the Milan prosecution office.<sup>97</sup> Within the SDAS group, not only do police provide prosecutors with the information they need to take decisions, they also present possible solutions for the cases. In other words: they suggest the decisions prosecutors should take. *Pubblici ministeri* can balance police extensive powers by reviewing their activities and, more importantly, they can also issue guidelines that police officers will follow when they will have to prepare the official documents which will form part of the prosecution file.

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<sup>96</sup> SDAS is the abbreviation of *Sezione Definizione Affari Semplici*. This means: unit specialised in dealing with simple matters. The decision to create this unit was taken within the prosecution office in 1998, in order to deal with the excessive backlog of cases.

<sup>97</sup> AP(N32).

There is an obvious “checks and balances” discourse between policing and prosecuting in the SDAS but, in practice, prosecutors’ power to review police activity appears limited. *Pubblici ministeri* seem to rely very much on the police’s opinion (i. e. “you can trust them, because they know what they are doing”). They do not very often seem to review and correct the documents prepared by the police.<sup>98</sup> There is, however, one last resource available to prosecutors. If they consider that a case does need further and deeper investigation, they can treat it personally and remove it from the SDAS group. Thus, prosecutors still maintain their right to make important choices on the style of judicial supervision that should be applied to an investigation. The consequence, in practice, seems to be that the form of supervision can change (“I will involve my personal police<sup>99</sup> with whom I have contacts everyday”).<sup>100</sup> In particular, when cases are removed from the SDAS group, prosecutors do not only review the information provided by the police, they can also prompt through directives (i. e. ask police to interview someone). However, it seems clear that these cases will never have a high priority (“For my cases [the priorities] I spend much more time”.<sup>101</sup>). As a consequence prosecutors’ preparedness to use their rights to influence the way the investigation is performed and the case is treated is limited.

The detailed descriptions made in this section lead to interesting conclusions. This analysis seems to provide a more nuanced and contingent portrayal of judicial

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<sup>98</sup> AP(N32).

<sup>99</sup> These can be the “assigned” police officers. However, prosecutors can also set up strict relationships with police officers who are specialised in treating the same kind of cases that prosecutors deal with in their specialised units.

<sup>100</sup> AP(N32).

<sup>101</sup> AP(N32).

supervision than that which emerges from the dominant academic literature on its operation within inquisitorial systems. In particular, there are a variety of choices that Italian prosecutors can make:

Anyway, there is always the *power to decide* [emphasis added]: when they give me the *posta*<sup>102</sup> I read and then I decide. In particular, if I believe that no crime has been committed (e. g. the victim initiation of *querela*<sup>103</sup> was after the time limit); then I can immediately take a decision, because police have already done everything, I decide; otherwise I think about the crime which has possibly been committed and then I issue a *delega*. If the crime is a priority I go to the crime site and I start directing the investigation [...] In general [for volume crimes] police perform the investigation and then they refer to me. However, if there is a priority my *deleghe* are very detailed, [in these cases] police only have residual powers to take discretionary decisions about the investigative acts to carry out.<sup>104</sup>

The significance of the “power to decide” should not be overestimated. The information on which prosecutors will base their decisions seems to depend very much on the police’s initiative on the investigative acts to be performed, but prosecutors are still in the position to determine certain crucial matters. Is the case a priority or not? Do police need close supervision? Do I need to carry out investigative acts? How should a *delega* be drafted? And, more important, is it a prosecutable case? This presents a rational image of a variable degree of intervention shaped by the necessities of the case. However, it should be remembered that these conclusions are based on interview evidence rather than independent case-file analysis. Such analysis

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<sup>102</sup> This literally means mail. This is the word prosecutors use to indicate the files they receive.

<sup>103</sup> This is a complaint from the victim and it is a necessary legal condition to prosecute certain crimes.

<sup>104</sup> AP(N11).

might reveal occasions where prosecutors are not aware of the complexities or importance of a case because they can only judge on the basis of the (police) reports they receive.

Finally, the main consequence created by the choice to bureaucratically supervise an investigation is that prosecutors' power to prompt by directives seems to be confined to the initial, generally not-detailed, *delega*. The result is that prosecutors do not seem to have their "hands on" the investigation. However, as Hodgson underlines for the French case: "This bureaucratic form of supervision, although relatively passive, has the potential benefit of filtering out obviously weak cases where the basic elements of an offence are not made out or where there has been a failure to comply with or document basic procedural safeguards".<sup>105</sup> The same conclusion could be reached for Italian prosecutors.

## 8. Conclusion

Sanders has argued that "cases cannot ever be dispassionately and accurately screened by any organization if all the information used to do the screening is provided by the organization being screened."<sup>106</sup> This emphasises the limits and ineffectiveness of

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<sup>105</sup> J. Hodgson (2005), *loc. cit.*, p. 152.

<sup>106</sup> A. Sanders, 'Constructing the Case for the Prosecution' ) Vol. 14 N. 2 *Journal of Law and Society* (1987) pp. 229-254, p. 249. See also Hodgson who writes that, in France, the aim of judicial supervision is "not to monitor closely the work of police, but to provide a more general 'legal orientation' in order to ensure the construction of a legally coherent dossier that will withstand the scrutiny of the court". See J. Hodgson (2005), *loc. cit.*, p. 151.

prosecutorial functions during the pre-trial phase, but there is an assumption that prosecutors are meant to closely supervise the police and, more generally, the investigation. In this article a different perspective has been presented. Italy is the example to demonstrate that, if certain conditions are satisfied, the practice of prosecution is not always dominated by the police even if cases are not closely supervised. Two models of judicial supervision have been described. The key distinction between these models stems from the number of interactions between prosecutors and police. The more these two legal actors interact, the more prosecutors can effectively supervise the investigation. These models may not reflect, in practice, the rules established in the Italian code of criminal procedure. In other words: judicial supervision in Italy, like everywhere else, does not mean that every investigation is closely scrutinised, but it can still be effective. Moreover, Hodgson explains that in France police and prosecutors inhabit different worlds.<sup>107</sup> This can be suggested for Italy as well: police carry out investigative activities; prosecutors review and, sometimes, prompt these activities, and, as in France, even in Italy police and prosecutors' professional ideologies appear very different. However, this difference does not prevent co-ordination between these two legal actors. In this sense, if the English tradition is moving towards the idea of a co-ordination and not separation between the police and prosecutors, the Italian case could provide a good example of the advantages and (possibly more important) the limits that this tendency can have. As noted, it is not possible to directly compare Italian and English criminal justice.

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<sup>107</sup> J. Hodgson (2001), *loc. cit.*, p. 352. The author talks about magistrate's professional ideology and says that: "is also part of the ideology of the *juge* [judge] that the functions of *magistrat* [investigating magistrate] and of police should be kept separate. There is a distance between the two which cannot be bridged".

But Italy can be presented as a sort of axis of reference, which may contribute to the understanding of co-ordination between the police and prosecutors when judicial supervision is founded on the prosecutors' power to direct the investigation. Finally, it is difficult to say if, in general, during the investigation the prosecutors' role is passive and reactive or proactive. Only observations and file analysis of a representative sample of cases could provide this information. *Pubblici ministeri* appear passive because they do not, generally, perform investigative acts; but they are active when they prompt via directives. Certainly Italian prosecutors appear more passive and reactive within the bureaucratic review model of supervision compared to the "prompting and reviewing" system. However, the passive/active dichotomisation of judicial supervision discourse would be misleading and too narrow. What can be argued is that the reality of supervision is variable, and that the very nature of judicial supervision in Italy stems from the various decisions that prosecutors can make. This, in the end, appears to be the distinctive feature of judicial supervision in Italy. And, as noted at the outset, this presents a different way to look at and interpret judicial supervision.